-- The SCPSC has approved BellSouth's SGAT and certified that BellSouth has complied with the Act even though, as BellSouth itself admits, the SGAT on its face violates the Commission's regulations in several critical respects. McNeely Aff. ¶¶ 13-16. Indeed, since the Commission issued its Local Competition Order, the SCPSC has, at BellSouth's behest, consistently ignored it. Id. ¶¶ 10-16.

-- The Order reflects the SCPSC's view -- directly contrary to the plain language and purpose of the Act -- that there is a "presumption in favor" of BOC entry into long distance that must be honored absent "a detailed factual showing that competitive harm is likely to result from such entry." BellSouth/SCPSC Compliance Order at 62-63; see McNeely Aff. ¶ 8.[28]

In summary, the SCPSC uncritically adopted a BellSouth-drafted order rife with fundamental errors of fact and law. The SCPSC's decision therefore is entitled to no deference.

II. BELLSOUTH MAY NOT PROCEED UNDER TRACK B

BellSouth's noncompliance with its checklist obligations is so pervasive and damaging to local competition, both in South Carolina and elsewhere, that the Commission should reject BellSouth's application on that basis. There is thus no need for the Commission to consider whether Track B is properly available to BellSouth at this time. Should the Commission decide to address that issue as well, however, it is plain that Track B is foreclosed to BellSouth.

As the Commission has held, a BOC may proceed with an application under Track B only in two limited circumstances. First, Track B is available whenever no potential or actual

---

[28] Indeed, the SCPSC's abdication of its role in evaluating local competition is underscored by the comment of one Commissioner that "Customers in South Carolina are smart . . . . They can say, 'I won't take BellSouth long distance until there's competition in the local market.'" See McNeely Aff. ¶ 8.

competitor has made a qualifying request for access and interconnection. § 271(c)(1)(B); see SBC Oklahoma Order ¶ 60[29]. Second, Track B is available in the event the state certifies that each of the providers that have made qualifying requests have either (a) failed to negotiate in good faith or (b) unreasonably failed to meet their implementation schedules. § 271(c)(1)(B)(i), (ii); see Ameritech Michigan Order ¶ 112 ("Once a BOC has received a qualifying request for access and interconnection, Track B is available, by its terms, only [if the two statutory exceptions apply]") (emphasis added); SBC Oklahoma Order ¶ 34. In making these assessments, the Commission will consider whether any of the BOC's "potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A)." Id. ¶ 58.

Neither of these two grounds is available to BellSouth. Although BellSouth now uses the word "certify" to describe the various findings that it wrote and the state commission adopted in the BellSouth/SCPSC Compliance Order (e.g., BellSouth Br. 8), BellSouth never asked the South Carolina PSC to make either certification provided for in subsection (c)(1)(B), no such certification was ever made in that Order, and no certification could have been made given the undisputed diligence of the parties in negotiating and concluding interconnection agreements and attempting to implement them. Accordingly, there is no basis for this Commission even to consider whether Track B may be invoked by virtue of the two exceptions identified in subsection (c)(1)(B).

---

[29] In the Matter of Application by SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Oklahoma, CC Docket No. 97-121, Memorandum Report and Order, FCC 97-228 (rel. June 26, 1997) ("SBC Oklahoma Order").

The relevant question therefore is whether BellSouth has received a qualifying request. The Commission has defined a qualifying request as "a timely request for access and interconnection that, if implemented, will lead to the type of telephone exchange service described in section 271(c)(1)(A)" and has indicated that the determination is "a highly fact-specific one." SBC Oklahoma Order ¶ 60. With respect to South Carolina, the record is plain that AT&T, for one, has made a qualifying request.

In early March, 1996, having already filed a request to amend its certificate of public convenience and necessity to permit AT&T to offer local exchange services throughout South Carolina, AT&T met with BellSouth and requested access and interconnection throughout BellSouth's region. Carroll Aff. ¶¶ 12-13. Later that month, AT&T followed up with requests that confirmed and amplified AT&T's intention to serve residential and business customers throughout the region using unbundled network elements, resale, and interconnection. Id. ¶¶ 14, 16-17. Finally, on June 10, 1996, AT&T provided BellSouth with written confirmation of its request for access and interconnection specific to South Carolina. Id. ¶ 15.

Submitted more than 15 months before BellSouth's 271 application, AT&T's request was timely under the statute. Cf. § 271(c)(1)(B). It also is one that -- had BellSouth been willing to implement it -- would have enabled AT&T to provide in South Carolina "the type of telephone exchange service described in section 271(c)(1)(A)." SBC Oklahoma Order ¶ 60. For example, by June 28, 1996, AT&T had submitted to BellSouth an initial draft interconnection agreement that proposed terms and conditions for local service provision through both resale and UNEs. In contemporaneous meetings, AT&T sought to have the ability to provide service via combinations of UNEs in place by November, 1996. Carroll Aff. ¶¶ 16-17.

BellSouth resisted AT&T's attempts to enter the market using combinations of UNEs at every turn. Even after the Commission promulgated its rules implementing the statute's requirements concerning UNE combinations, and even though those rules were not stayed but were in effect throughout the time period relevant to BellSouth's section 271 application, BellSouth chose to defy its legal obligation to provide AT&T with access to existing combinations of network elements. Notably, BellSouth refused to accede to terms in its interconnection agreement with AT&T that would have permitted AT&T to obtain existing combinations of elements and it refused to offer such access in its SGAT. Carroll Aff. ¶¶ 18, 20, 23-26.

Despite BellSouth's resistance, AT&T has pursued UNE-based entry throughout BellSouth's region. In Kentucky and Florida (states that, unlike South Carolina, were willing to enforce the Commission's rules regarding UNE combinations), AT&T has pressed BellSouth to test and develop the capability necessary to enable AT&T to order UNE-based service for residential and business customers. See Crafton Aff. ¶¶ 26-27. Even in those states, BellSouth has refused to take reasonable steps to work with AT&T to develop that capability. Id. ¶¶ 28-37. As a result, throughout the time period relevant to this application, AT&T has been unable to order UNEs to provide service for its customers.[30]

In short, had BellSouth responded constructively to AT&T's request for UNE-based entry under the law as applicable throughout the relevant time period, AT&T would have been able

[30] That the Eighth Circuit has now vacated the Commission's rules regarding separation of unbundled elements does not affect this conclusion, because AT&T's efforts to obtain those combinations were reasonable under the regulations that were in effect throughout the period relevant to the application.

to provide "the type of telephone exchange service described in section 271(c)(1)(A)." SBC Oklahoma Order ¶ 60. These facts are more than sufficient to demonstrate that AT&T, for one, has made a "qualifying request" that forecloses Track B.

BellSouth does not and cannot dispute any of these facts. It relies instead on the BellSouth-drafted statement in the BellSouth/SCPSC Compliance Order that "'none of [BellSouth's] potential competitors are taking any reasonable steps towards implementing any business plan for facilities-based local competition for business and residential customers in South Carolina.'" BellSouth Br. 8 (quoting Order at 19). That statement is demonstrably incorrect.

First, the context makes plain that the referenced "facilities" did not include UNEs. The Commission has squarely held that unbundled network elements obtained from a BOC qualify as a competitor's "own" facilities for purposes of section 271(c). Ameritech Michigan Order ¶ 101. The BellSouth/SCPSC Compliance Order simply never discusses, let alone refutes, the overwhelming evidence that AT&T has sought UNE-based entry in South Carolina.

Second, even apart from UNEs, the statement is factually incorrect. One carrier (ACSI) stated that it was planning to provide facilities-based service beginning in early 1998, and AT&T intends to soon begin offering facilities-based local service to business customers via AT&T Digital Link.[31] Carroll Aff. ¶ 19.

---

[31] The South Carolina PSC's conclusion that CLECs are not "taking any reasonable steps towards implementing any business plan for facilities-based local competition" is thus wholly unfounded. Not only does it fail to represent an independent assessment of the facts, but it ignores (1) the Commission's ruling that UNE-based entry is sufficient to satisfy Track A and (2) the Commission's rulings that UNEs must be made fully available, both individually and in combination, at cost-based rates. By failing to enforce the Commission's rules, the (continued...)

In short, AT&T has requested and pursued the type of competing residential and business service that would satisfy the requirements of Track A as construed by the Commission. BellSouth is therefore not entitled to invoke Track B.[32]

III. BELLSOUTH CURRENTLY OPERATES IN VIOLATION OF SECTION 272 AND HAS PROVIDED NO BASIS FOR A FINDING THAT IT WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY

Section 271(d)(3)(B) requires the Commission to deny BellSouth's application unless it finds that the "requested authorization will be carried out in accordance with the requirements of section 272." This Commission has stressed that this requirement is "of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate." Ameritech Michigan Order ¶ 346.

BellSouth's application and its actions to date provide no basis for a finding that it will comply with section 272. BellSouth currently violates the public disclosure requirements of section 272(b)(5), and openly defies the requirements of the Act and this Commission's holding

---

[31] (...continued)
South Carolina PSC has itself contributed to the inability of CLECs to bring local competition to South Carolina.

[32] BellSouth's half-hearted suggestion (Br. 15) that "it is even possible" that BellSouth "has satisfied Track A as well" is an obvious non-starter, both procedurally and substantively. BellSouth's failure to provide "all the factual evidence" needed to support a Track A application in its initial filing is itself grounds for rejecting the claim. E.g. Ameritech Michigan Order ¶¶ 43, 50-55. And in any event, any purportedly facilities-based carrier so obscure that even BellSouth cannot discover its existence or size necessarily has "a commercial presence that is so small" as not to qualify as a competing provider under Track A. Id. ¶ 77.

in the Ameritech Michigan Order by asserting that it is not currently subject to the restrictions of section 272. BellSouth has provided wholly inadequate information concerning its substantial transactions with BellSouth Long Distance ("BSLD"), again in outright defiance of the holding in the Ameritech Michigan Order. BellSouth also has stated its intent to violate the "equal access" requirements of section 251(g) as dictated by the Ameritech Michigan Order when it begins joint marketing of its long distance services under section 272(g). Finally, BellSouth has not instituted any internal procedures or practices to protect against violations of section 272, and has not presented even a plan on how it intends to "true up" those past transactions with its long-distance affiliate that were in violation of section 272 so that its affiliate does not enter the long-distance market with unlawful subsidies and other discriminatory advantages. Instead, BellSouth presents only paper promises of future compliance, while asserting its freedom to violate section 272 up until it receives interLATA authorization.

Section 272(b)(5) requires that "all transactions" between a BOC and its affiliate created to provide interLATA service be "reduced to writing and available for public inspection." These disclosure requirements, as this Commission made plain in the Ameritech Michigan Order, have required BOCs and their section 272 affiliates, since the passage of the Act on February 8, 1996, to make publicly available "in some manner" all transactions for information, services, or facilities in which they have been engaged. Ameritech Michigan Order ¶ 371.[33] In addition,

---

[33] BellSouth has asked the Commission to reverse this holding, arguing that section 272 only binds a BOC and its long-distance affiliate after interLATA authority has been granted. BellSouth Br. 59. Section 272, however, contains no such limitation, and instead applies by its terms whenever a BOC creates an affiliate to provide interLATA services. The fact that section 271(d)(3)(B) calls upon the Commission to make a predictive judgment that a BOC and its section 272 affiliate "will comply" with section 272, does not alter the fact that

(continued...)

the Accounting Safeguards Order[34] issued December 24, 1996, requires that all BOC transactions with Section 272 affiliates be posted on the Internet,[35] which requirements became effective on August 12, 1997.[36]

BellSouth has been and continues to be in violation of section 272(b)(5). BellSouth's section 272 affiliate, BSLD, was incorporated approximately one month after the Act's enactment, in March 1996, and BellSouth has identified fifteen categories of separate services with a total cost of over $8.8 million that it has provided to BSLD. McFarland 272 Aff. ¶ 21 n.10. Yet on October 7, 1997, one week after it filed its current application, BellSouth told representatives of AT&T that -- despite contrary representations in BellSouth's application -- "there were no documents available for public inspection" regarding these transactions.

---

[33] (...continued)
Section 272 itself mandates current compliance, as the Commission has found. In any event, BellSouth -- which has created a section 272 affiliate, has engaged in numerous transactions with that affiliate, and has stated that it has been and is in compliance with section 272 -- cannot hope to meet its burden of establishing that it "will comply" with the restrictions of section 272 unless it shows that it currently is complying with section 272.

[34] Accounting Safeguards under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC 96-490 (rel. Dec. 24, 1996) ("Accounting Safeguards Order").

[35] The Accounting Safeguards Order requires the Section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transactions through the company's home page." Accounting Safeguards Order, ¶ 122.

[36] See Ameritech Michigan Order ¶ 364 n.939.

McFarland 272 Aff. ¶ 32.[37] Nor have any written descriptions of these transactions been posted on the Internet by BellSouth or BSLD. Id. ¶ 28.

In addition, the limited disclosure of these services in the present application, see BellSouth's Jarvis Aff. ¶ 14(c), is completely inadequate under Section 272 and in bald violation of the Ameritech Michigan Order. The Accounting Safeguards Order made clear that "the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow [the Commission] to evaluate compliance with [the] accounting rules." Accounting Safeguards Order ¶ 122. Here, the descriptions of the fifteen different categories of "services" provided by BellSouth to BSLD come nowhere near providing the detail necessary to meet this requirement. First, not one of the descriptions contains the actual rates charged for each transaction, as required in the Ameritech Michigan Order ¶ 369, but instead provides only a total cost figure for all the transactions grouped under a particular service category. Nor do these descriptions identify prices or other specific terms and conditions of each transaction, or even the time periods during which each transaction took place.[38] BellSouth even limits this meager disclosure to services "through July 31, 1997," Jarvis Aff. ¶

---

[37] Even after AT&T representatives repeatedly pointed out that BellSouth's affidavits in this proceeding stated that written records of all transactions currently were "available for public inspection," Cochran Aff. ¶ 26, BellSouth still refused to produce those records, and instead created and produced a list of transactions that simply parroted the service descriptions found in the BellSouth affidavits in this proceeding.

[38] In at least one case, the general description is itself suggestive of potential discrimination. BellSouth appears to have indefinitely reserved collocated space for BSLD for a two-year term that does not begin until its "equipment becomes operational," (Jarvis Aff. ¶ 14(c), at 10), while under the SGAT BellSouth offers collocation not with a right to reserve but merely "based on space availability and on a first come, first serve basis." Varner Aff. Exhibit AJV-4 at 9 (BellSouth Collocation Handbook). See McFarland 272 Aff. ¶ 25.

14(c) at 6, thus providing no description of transactions after that date up to the time of its current application on September 30, 1997.

Plainly, BellSouth's simple recitation of the types of services provided and the total aggregate costs for these services provides no basis to evaluate its compliance with the accounting rules, and therefore precludes any finding that BellSouth will carry out the requested authorization in accordance with Section 272. Cf. Ameritech Michigan Order ¶ 369 ("Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272."). BellSouth at least must disclose whatever written agreements it has with BSLD reflecting the over $8.8 million worth of services it has provided. Of course, if these services have not been memorialized into written agreements, and instead are the result of the ad hoc provision of information and services, that itself would be strong evidence that BellSouth and BSLD have not conducted their affairs at "arms length" as required by section 272.

In addition, BellSouth has identified no internal systems or procedures in place that are designed to protect against violations of Section 272. See McFarland 272 Aff. ¶¶ 38-40. For example, some BOCs have instituted oversight programs to review and approve transactions between the BOC and section 272 affiliate and have required that all communications and transactions proceed through identified customer contacts to attempt to ensure that access to information and services is uniform for affiliates, CLECs, and IXCs, and to limit unlawful "off-the-record" exchanges of information and services between the BOC and affiliate. See McFarland 272 Aff. ¶ 41. Without a showing by BellSouth that it has instituted internal systems

or procedures geared specifically to the unique compliance problems presented by section 272, there is simply no basis to make any judgment on whether it is ready and able to comply with section 272.

Nor has BellSouth presented any specific information as to what efforts it has made to identify past transactions that have impermissibly subsidized BSLD or otherwise discriminated in favor of BSLD. Given that BellSouth and BSLD have operated under the view that the restrictions of section 272 have not applied to their transactions to date, such a review of past transactions is imperative. Similarly, BellSouth has not presented any plans to remedy, through "true-up" or otherwise, whatever impermissible subsidies or discrimination already have occurred, which, unless rectified, would allow BSLD to enter the interLATA market with anticompetitive advantages. McFarland 272 Aff. ¶ 48.

Finally, BellSouth asserts that, once it gains interLATA authority, it will provide joint marketing services for BSLD pursuant to section 272(g)(2) and will instruct its customer service representatives that, when handling inbound customer calls for new local exchange service, they are to recommend that the customer accept long distance service from BSLD and are not to recite a list of long distance carriers unless the customer requests that such a list be read.[39] This suggested telemarketing practice on its face violates the equal access requirements of section 251(g), and again defies this Commission's Ameritech Michigan Order, which held that

[39] BellSouth has identified the following telemarketing script as acceptable for inbound calls: "You have many companies to choose from to provide your long distance service. I can read from a list the companies available for selection, however, I'd like to recommend BellSouth Long Distance." Varner Aff. ¶ 230.

any marketing script that names the BOC's long distance affiliate without also listing the names of other long distance carriers is unacceptable. Ameritech Michigan Order ¶ 376.[40]

On this record, there simply is no basis for a finding that BellSouth will operate in accordance with section 272, and BellSouth's application can be rejected on this ground alone.

IV. BELLSOUTH HAS NOT SHOWN THAT ITS ENTRY INTO THE INTEREXCHANGE MARKET IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

Finally, BellSouth's application should be denied because BellSouth has not shown, and cannot show, that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." See § 271(d)(3). BellSouth's continuing resistance to competition means that BellSouth's interLATA entry would harm consumers in local and long distance markets alike.

A. BellSouth Bears The Burden Of Establishing That Its InterLATA Authorization Is In The Public Interest

Section 271 and the Ameritech Michigan Order unambiguously place upon BellSouth the burden of establishing that its entry is in the public interest. See § 271(d)(3)(C) ("The

---

[40] BellSouth does not even attempt to distinguish its proposed marketing effort from Ameritech's telemarketing script, and instead notes that it has asked the Commission to reconsider this aspect of the Ameritech Michigan Order. BellSouth Br. 63. There is no basis for such reconsideration, however, because, contrary to BellSouth's claims, the Ameritech Michigan Order is consistent with a BOC's ability to engage in joint marketing under section 272(g)(2) and with the Commission's prior Non-Accounting Safeguards Order. The Non-Accounting Safeguards Order did not endorse any specific marketing script to be used for inbound calls, and instead merely held that marketing efforts of some sort during such calls were permitted. See Non-Accounting Safeguards Order ¶ 292. Indeed, the Non-Accounting Safeguards Order made clear that whatever marketing was attempted on such inbound calls, it must be consistent with the equal access requirements of section 251(g), which forbids the identification of only one interexchange carrier during such inbound calls. Id. ¶ 292.

Commission shall not approve the authorization . . . unless it finds that . . . the requested authorization is consistent with the public interest, convenience, and necessity.") (emphasis added); Ameritech Michigan Order ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied.")

Notwithstanding this authority, BellSouth maintains that BOC entry into the interexchange market is presumptively in the public interest. BellSouth Br. 72. This startling proposition conflicts not only with the burden of proof as imposed by the statute and this Commission, but with the premise, central to the MFJ and preserved in the Act, that integration of the BOCs' local exchange monopolies with interexchange service is anticompetitive and contrary to the public interest. For this reason, the 1996 Act creates mechanisms and incentives to break up the BOCs' local monopolies before BOC entry into long distance is permitted. See § 271(d)(3). Indeed, by rejecting the BOCs' pleas for long distance entry by a "date certain" and for elimination of the separate public interest inquiry,[41] Congress decisively foreclosed any presumption that BOC entry was in the public interest.

B. The Absence Of Competition In South Carolina Local Exchange Markets Demonstrates That BellSouth's Entry Into The Interexchange Market Would Be Inconsistent With The Public Interest

In the Ameritech Michigan Order, the Commission held that the public interest "inquiry should focus on the status of market-opening measures in the relevant local exchange market" (id. ¶ 385) and determine whether the "local telecommunications market is, and will remain,

---

[41] See Discussion Draft, dated January 31, 1995, 104th Cong., 1st Sess., introduced by Senator Pressler, Section 255(a), at 54-57; see also infra, at 73 (discussing Congress's decision to preserve a separate public interest inquiry).

open to competition." Id. ¶ 386. For all practical purposes, the local market in South Carolina is virtually as closed to competition as it was before the Act was passed. Given BellSouth's demonstrated ability to forestall competitive entry, long distance relief will not be in the public interest until competitors manage to establish widespread facilities-based competition.

That time may now be further delayed given the Eighth Circuit's decision, on rehearing, to vacate the principal rule implementing the BOCs' statutory obligation to provide nondiscriminatory access to existing UNE combinations.[42] Before that decision, it might have been reasonable to expect that UNE-based competition could relatively soon have mitigated most of the substantial public interest concerns addressed by the current prohibition on BOC provision of in-region, interLATA services. Such an expectation was dependent upon a BOC actually fulfilling its obligation to provide nondiscriminatory access to existing UNE combinations at forward-looking cost, and to provide the OSS interfaces and other arrangements needed to use such combinations to provide commercial service. If it did so, new entrants would then be able to offer consumers many of the benefits -- innovation, new services, and lower prices -- that otherwise can come only through real facilities-based competition. See Crafton Aff. ¶¶ 6-7.

Of course, BOCs remain free, even after the Eighth Circuit's decision, voluntarily to offer such access, and any who are serious about gaining interLATA entry may choose to do so. But if a BOC refuses to provide new entrants with effective means to compete using unbundled network elements -- regardless of who does the combining -- then the Act will not quickly achieve its goal of bringing consumers the benefits of local competition; BOCs would

[42] In light of the Eighth Circuit's unfortunate, and in AT&T's view unfounded, decisions diluting the Act and the Commission's decisions thereunder, rigorous application of the public interest test is necessary and appropriate.

continue to wield exclusive control over their essential local facilities, alone enjoying the use of those facilities at cost, and the ability to define retail offerings. As a result, only a BOC would be able to offer, on any meaningful scale and with any meaningful vigor, bundled local and long distance service. InterLATA authorization could then be in the public interest only when significant, broad-based facilities-based entry had occurred.

1. There Is No Effective Competition In The Local Exchange Market Due To BellSouth's Efforts To Thwart Entry.

As the Commission recently reaffirmed, the local exchange market remains "one of the last monopoly bottleneck strongholds in telecommunications." Non-Accounting Safeguards Order ¶ 205. South Carolina's local exchange markets, which are completely dominated by BellSouth, are certainly no exception. BellSouth's share of the South Carolina local exchange markets in its service area exceeds 99%. Hubbard/Lehr Aff. ¶ 46. As this overwhelming market share vividly illustrates, there are currently no competitors capable of constraining BellSouth's ability or incentive to engage in anticompetitive behavior. Hubbard/Lehr Aff. ¶¶ 46-54.

BellSouth does not contend otherwise.[43] It acknowledges that no carriers have ordered unbundled loops from BellSouth in South Carolina, (Br. 13), and it does not argue that there is any meaningful resale activity in South Carolina local markets. Indeed, it concedes that, including "test orders," there are no more than 2,400 resold lines in South Carolina, (Br. 104), and contends that the absence of local competition in South Carolina is due solely to "demographic and economic conditions unrelated to BellSouth's offerings." BellSouth Br. 15.

At the outset, there is no merit to BellSouth's position that CLECs have avoided the South Carolina market merely to "protect long distance profits and pursue more profitable markets." BellSouth Br. 106. BellSouth admittedly has 83 interconnection agreements with CLECs -- many of whom have no long distance revenues whatsoever. See BellSouth Br. 5 and n.4. BellSouth offers no cogent reason why these carriers would undertake the trouble and expense of negotiating interconnection agreements if they had no intention of entering the South Carolina local exchange market. Nor can BellSouth reconcile its contention that IXCs have purposely avoided the South Carolina market with AT&T's diligent and costly efforts to enter that market. See Carroll Aff. ¶ 9-20. Indeed, as an examination of many of the public interest

---

[43] BellSouth briefly maintains that the threat of competition from potential facilities-based carriers "imposes a significant competitive constraint on BellSouth's conduct." BellSouth Br. 105. This reliance on the possibility of future local exchange competition to gain entry now into long distance conflicts with both law and sound economic principles. The strict requirements of Section 271 belie any suggestion that the mere promise of future competition constitutes a basis for authorizing BOC entry into in-region, interLATA markets. Moreover, the economic reality is that potential competition will not act as an effective competitive constraint so long as there are entry barriers into the relevant market. Baumol Aff. ¶¶ 24-33. As demonstrated infra, at 64-66, 69-71, there clearly remain substantial barriers in the local exchange market, as reflected most strongly in the absence of competition in that market.

considerations raised in the Ameritech Michigan Order (¶¶ 391-397) demonstrates, the absence of competition in the local market is caused not by CLEC foot-dragging, but is directly caused by BellSouth's efforts to preserve its monopoly status and by a hostile state regulatory environment. See Carroll Aff. ¶¶ 4, 20-35; McNeely Aff. ¶ 5.

In its public interest analysis in the Ameritech Michigan Order ¶ 391, the Commission stressed that "it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available." By (i) refusing to offer UNEs, including combinations of UNEs, at forward-looking, cost-based rates or with their full features, functions, and capabilities; (ii) providing grossly inadequate OSS; (iii) offering a wholesale discount that is flatly inconsistent with the Commission's rules and is among the smallest in the country; and (iv) refusing to offer for resale the individual contract service arrangements that it uses to lock up large customers, BellSouth has ensured that two of the three modes of CLEC entry -- unbundled network elements and resale -- are effectively foreclosed. See Carroll Aff. ¶¶ 20-35; Crafton Aff. ¶¶ 8-39; Tamplin Aff. ¶¶ 6-63; Bradbury Aff. ¶¶ 17-192; McFarland Resale Aff. ¶¶ 19-25, 28-36; Wood Aff. ¶¶ 21-48.

Moreover, BellSouth has not taken other steps cited by the Commission as "conducive to efficient, competitive entry." Ameritech Michigan Order ¶ 392. Far from endorsing "pick and choose" most favored nation clauses that enable competitive alternatives to "flourish rapidly throughout a state," id., BellSouth has challenged this Commission's authority even to consider such contractual provisions in its public interest analysis.[44]

---

[44] Petition of BellSouth Corporation For Reconsideration and Clarification, In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act (continued...)

In addition, while BellSouth has agreed to some performance monitoring in the BellSouth/AT&T interconnection agreement, the measurements to which it has agreed are insufficient to gauge "compliance with its obligation to provide access and interconnection to new entrants in a nondiscriminatory manner." Ameritech Michigan Order ¶ 393; Pfau Aff. ¶¶ 20-85. BellSouth also has made no showing that it has agreed to "private and self-executing enforcement mechanisms that are automatically triggered by noncompliance" with established performance standards. See Ameritech Michigan Order ¶ 394. The BellSouth/AT&T Interconnection Agreement, § 12.3, provides only that the parties shall develop a "process improvement plan" if BellSouth's performance falls below the level of performance it has agreed to provide. Because, however, it does not impose any self-executing penalties on BellSouth for inadequate performance, it is not "sufficient to ensure compliance with the established performance standards." See Ameritech Michigan Order ¶ 394.

Further, entry barriers into South Carolina local exchange markets have been raised even higher by the SCPSC's failure to require BellSouth to comply with the Act and this Commission's orders. By issuing BellSouth's proposed order approving its SGAT in its entirety, the SCPSC endorsed BellSouth's blatant defiance of the requirements of federal law. See McNeely Aff. ¶¶ 17-46. In the process, the SCPSC also incorporated all of the other fundamental errors of law and fact proposed by BellSouth with respect to critical issues such as the status of CLEC entry plans and BellSouth's provision of non-discriminatory and reasonable access to UNEs and OSS. See McNeely Aff. ¶¶ 22-42. The state commission's indifference,

[44] (...continued)
of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, pp. 10, 15-16 (filed September 18, 1997).

if not hostility, to "'doing the hard job of promoting competition in its jurisdiction'" (Br. 11 (citation omitted)) serves only further to chill local entry.

2. BellSouth's Premature Entry Into The Interexchange Market Would Provide BellSouth Incentive And Opportunity To Harm Competition

Having conceded the lack of any meaningful competition in South Carolina, BellSouth argues that its entry into long distance will spur local competition as interexchange carriers and other competitors are forced to "'respond with competitive offerings'." BellSouth Br. 103 n.64 (quoting Hausman Aff. ¶ 9). This argument defies common sense. As demonstrated above, it is BellSouth's anticompetitive behavior that has prevented CLECs from penetrating South Carolina's local market. BellSouth's entry into long distance will not bring down any of the insurmountable barriers to effective competition that it has erected.

To the contrary, currently BellSouth's only incentive to open local markets is the prospect of long distance entry. Hubbard/Lehr ¶¶ 80, 88. Once BellSouth is granted interLATA authority, its sole incentive will be to further impede the development of local competition, both to protect monopoly revenues it enjoys from local exchange and exchange access services, and to maintain its anticompetitive advantages over other carriers that would otherwise seek to provide bundles of local and long distance services in competition with it. Hubbard/Lehr Aff. ¶¶ 87-106; Bork Aff. ¶ 20.

Granting BellSouth's application now would therefore immediately create a second monopoly in addition to BellSouth's current monopoly over local exchange service -- a monopoly over the provision of bundled packages consisting of BellSouth's local service and long distance service (which BellSouth could buy at a wholesale discount that dwarfs the 14.8% discount available to would-be CLECs in South Carolina). BellSouth witnesses Gilbert and Hausman

argue that BellSouth must be allowed to enter long distance to compete for the provision of bundled goods. Gilbert Aff. ¶¶ 6-17; Hausman Aff. ¶ 7. However, as the central premise of BellSouth's Track B application suggests, there is no meaningful competition in the local market. Therefore, BellSouth would be the only carrier with the opportunity to offer end-to-end service in significant volumes, and would be able to foreclose competition for the numerous subscribers that would find that offering attractive. Hubbard/Lehr Aff. ¶¶ 86; 112-117.

BellSouth could also harm long distance competition in numerous ways. It could, for example, engage in a classic price squeeze against its long distance competitors merely by continuing to impose inflated charges for non-competitive exchange access. Hubbard/Lehr Aff. ¶¶ 91-94; Baumol Aff. ¶¶ 13-15, 39. BellSouth's argument that a price squeeze would be unlikely to drive existing long distance carriers out of business is beside the point. Price squeezes of this sort are anticompetitive regardless of whether carriers are driven to bankruptcy, because they divert long-distance customers to the BOC even when the BOC is the less efficient alternative. Hubbard/Lehr ¶ 93 & n.70.

If unconstrained by competition, BellSouth could also use local exchange revenues to subsidize its long distance business. Through a variety of means, it could mischaracterize costs of providing long distance services as local exchange costs, recover those costs from monopoly ratepayers, and thus price its long distance service below cost with no loss to itself -- thereby harming consumers in both the local market and the long distance market. Hubbard/Lehr Aff. ¶ 97; Bork Aff. ¶¶ 21-29. Contrary to BellSouth's claim, price caps cannot prevent such anticompetitive cost misallocation, because whenever a price cap is set or modified to reflect new technology, the regulator must take account of the BOC's costs to arrive at a cap that

covers costs and allows a reasonable rate of return. In establishing these costs, the BOC has the same incentive and opportunity to shift costs from long-distance service to local service that it has under traditional rate of return regulation. Bork Aff. ¶ 34 n.1.

BellSouth also would have powerful incentives to discriminate in the pricing and provisioning of monopoly exchange access services to its "captive" long distance competitors, so as to raise their costs and degrade the quality of their service. Hubbard/Lehr Aff. ¶¶ 55-77. Such discrimination would allow BellSouth both to expand its share of the long distance market by disadvantaging carriers that provide "stand alone" long distance service, and to protect its local market and customer base from competitors seeking to provide bundled long distance and local services. See Notice of Proposed Rulemaking, Non-Accounting Safeguards ¶ 139 (July 18, 1996) ("Non-Accounting Safeguards NPRM") ("To the extent customers value 'one-stop shopping,' degrading a carrier's interexchange service may also undermine the attractiveness of the carrier's interexchange/local exchange package and thereby strengthen the BOC's dominant position in the provision of local exchange service.").

BellSouth's principal response to the risk that it will engage in anticompetitive conduct if permitted in the long distance market is to trumpet the efficacy of regulation. If, however, regulation alone were sufficient to deter anticompetitive conduct, Congress need not have included a public interest test in the Act at all, but could have merely conditioned BOC in-region, interLATA entry upon the adoption of appropriate regulations. See Ameritech Michigan Order ¶ 388 ("Section 271 . . . embodies a congressional determination that . . . local telecommunications markets must first be opened to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance

market.") Moreover, BellSouth's continuous flouting of this Commission's orders, which has gone unchecked by the SCPSC, see supra, at 2-5, 46-48, fully refutes BellSouth's contention that regulation will restrain its anticompetitive conduct.

Furthermore, BellSouth fails to acknowledge that its anticompetitive conduct would remain exceptionally "difficult to police, particularly in situations where the level of the BOC's cooperation with unaffiliated . . . carriers is difficult to quantify." Non-Accounting Safeguards NPRM ¶ 139; Hubbard/Lehr Aff. ¶¶ 63-70; Bork Aff. ¶¶ 24-29. It contends that discrimination would be a virtual impossibility because it would require conduct that would be "invisible to other interexchange carriers and regulators, yet so apparent to customers that it drives them to switch to BellSouth's long distance service, but not the service of some other competitor." BellSouth Br. 92. Such rhetoric entirely misses the central point about the limitations of regulation and competitor vigilance: The problem confronting regulators is not that discrimination would be difficult to observe. The problem, rather, is that it is extremely costly and nearly impossible to prove that cross-subsidies, cost shifting, or service degradation is the product of anticompetitive discrimination rather than justifiable business practice. Hubbard/Lehr Aff. ¶¶ 65, 67, 69; Bork Aff. ¶¶ 24-29.

Again, BellSouth's own conduct best illustrates the extreme costs of relying exclusively on regulation to control the anticompetitive behavior of a monopolist. By continuously seeking reconsideration of settled rulings, BellSouth has been able effectively to forestall implementation of the Commission's orders regarding pricing and UNE combinations. See BellSouth Br. 20 & n.15 (citing appeals and petitions challenging the Commission's rules and orders). Indeed, BellSouth's present application, which is openly contrary to several rulings of this Commission,

further illustrates BellSouth's ability to use the regulatory process to postpone the time when it must comply with its existing obligations under the Act and this Commission's orders. See, e.g., BellSouth Br. 9 n.8, 20-21, 28-29, 32, 63, 69-72; see also Hausman Aff. ¶¶ 10-11, 25. Such conduct should not be surprising, in light of BellSouth's candid acknowledgement that "[i]t is rational . . . for the dominant incumbent to exploit the regulatory regime to the greatest possible extent without exposing itself to the threat of intervention or adverse changes to the regime."[45]

In addition to this fundamental failure of BellSouth to comply with sections 251 and 252 of the Act, BellSouth has engaged in a host of anticompetitive activities that belie its claims that its expansion into long distance markets would be in the public interest. See Ameritech Michigan Order ¶ 397. This is seen most starkly in the intraLATA toll market. BellSouth has consistently opposed introducing competition of any kind into the intraLATA toll market, and has even opposed services that could incidentally be used to complete such calls. See Hubbard/Lehr Aff. ¶ 74 & n.60.

Even after competition was ordered by the SCPSC, BellSouth has engaged in blatantly discriminatory and anticompetitive behavior. In 1993, BellSouth, as part of an offering called "Calling Area Plus," entered into an industry stipulation under which all carriers, interexchange carriers and LECs, would pay the same terminating access charges to the LEC that completed intraLATA toll calls. AT&T later discovered, however, that BellSouth had entered into a secret side agreement with certain independent LECs. Under this secret agreement, these LECs

---

[45] BellSouth New Zealand, Regulation of Access to Vertically-Integrated Natural Monopolies: A Discussion Paper at 2 (Sept. 29, 1995).

charged each other lower access charges than they were charging competing interexchange carriers. After the secret deal was exposed, BellSouth was forced to enter into a new stipulation giving IXCs more favorable treatment. Hubbard/Lehr Aff. ¶ 74.

BellSouth has also thwarted competition by shrinking the intraLATA toll market. It has aggressively expanded its local calling areas, and thus transformed what used to be intraLATA toll calls (subject to competition) into local calls (which are not subject to competition). Moreover, recently BellSouth has introduced new calling plans in Georgia and Florida that offer a flat-rate for all calls within the LATA. This is a classic price squeeze: In many instances BellSouth's flat rate is below the usage-sensitive access charges that its competitors must pay for the same calls. Therefore, interexchange carriers cannot compete with BellSouth, even if they are more efficient. Hubbard/Lehr Aff. ¶ 75.

Finally, the Florida and Kentucky commissions recently ordered BellSouth to stop employing a number of anticompetitive marketing practices in the intraLATA toll market. Id. ¶ 76. A similar complaint is pending in Georgia. Id.

In sum, for so long as BellSouth's competitors remain critically dependent upon access and interconnection to BellSouth's network, BellSouth can engage in numerous forms of discrimination that cannot be forestalled by regulation. BellSouth's own blatant refusals to comply with the requirements of the Act and this Commission's order are powerful evidence that it would be contrary to the public interest to admit BellSouth into the long distance market until substantial facilities-based competition secures a competitively open local market.

3. BellSouth's Contention That The Public Interest Inquiry Should Not Examine Local Competition Lacks Merit

Lacking any meaningful response to the absence of local competition, BellSouth contends that local competition should be deemed off-limits to the public interest inquiry. BellSouth Br. 68-72. The Commission rejected that view in the Ameritech Michigan Order, ¶ 386, and should do so again here.

First, it is settled law that the impact on competition must be considered as part of an inquiry into the public interest, convenience, and necessity. Denver & Rio Grande Western R.R. Co. v. United States, 387 U.S. 485, 492 (1967); United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980). Indeed, given that the BOCs' ability to leverage their local service and exchange access monopolies lies at the heart of the ongoing interLATA restriction, it would be absurd to lift the interLATA quarantine without first considering whether the condition that necessitated the quarantine persists.

Second, consideration of local competition under the public interest test does not "extend" the competitive checklist. While the checklist specifies the minimum terms that BOCs must provide, the public interest test assures that BOC entry will not occur so long as it would generate anticompetitive effects in telecommunications markets. See § 271(d)(3). Because the Commission has not adopted a rigid requirement as to additional terms BOCs must offer in every State, it has not added to the checklist -- any more than Congress did when it added a separate public interest requirement. See Ameritech Michigan Order ¶ 391 ("We emphasize that, unlike the requirements of the competitive checklist, the presence or absence of any one factor will not dictate the outcome of our public interest inquiry.").